Supreme Court, U.S.
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No. 95-265

In The

Supreme Court of the United States

October Term, 1995

CLEVELAND INDUSTRIAL SQUARE, INC.,

Petitioner,

vs.

MICHAEL R. WHITE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in granting Respondents' Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, where Petitioner's two-count Complaint alleged that Respondents had, under color of law, committed the intentional torts of Conversion and Slander of Title, and deprived Petitioner of its property without due process of law, but where the Petitioner's Complaint failed to allege that state law remedies were inadequate to redress the alleged tortious conduct.

PARTIES TO THE PROCEEDING BELOW

The Petitioner herein, Cleveland Industrial Square, Inc., was the Plaintiff in the trial court. Respondents Michael R. White, Danny R. Williams, Kenneth G. Silliman, Ronald Jones, and William Ondrey Gruber were defendants in the trial court. No other person has been a party to this action. All of the respondents were employees of the City of Cleveland at the time the events sued upon were alleged to have occurred. However, the City of Cleveland itself is not and never has been a party to this action.

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SUMMARY OF THE ARGUMENT

Petitioner alleges that Respondents, acting under color of law, deprived Petitioner of its property without procedural due process of law, through the commission of two intentional torts: conversion and slander of title. However, Petitioner does not allege that state law remedies are inadequate to redress this alleged tortious conduct. Accordingly, Petitioner's claim is not actionable under 42 U.S.C. § 1983. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Hudson v. Palmer,* 486 U.S. 517 (1984). Therefore, the Complaint fails to state a federal claim upon which relief can be granted. *Vicory v. Walton,* 721 F.2d 1062 (6th Cir. 1983).

STATEMENT OF THE CASE

A. Procedural History of the Case

The case below was initiated when Petitioner filed its Complaint with the U.S. District Court on July 17, 1992. Petitioner's Complaint unambiguously set forth two claims for recovery. Count I of the Complaint was a claim in conversion. Count II was a claim for slander of title. Both of these claims are intentional torts under applicable state common law doctrines, which Petitioner claims are actionable under federal law pursuant to 42 U.S.C. § 1983, because its "rights to due process of law" were allegedly denied thereby.

The Respondents jointly filed an answer on August 31, 1992. That answer contained the appropriate denials

to the specific factual allegations, and a number of affirmative defenses. Relevant to the instant petition, the Respondents raised the defense that the Complaint failed to state a claim against any of the defendants (Respondents) upon which relief could be granted.

On October 2, 1992 Respondents filed a Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules, based upon the defense that the Complaint failed to state a claim against any of the defendants upon which relief could be granted.

On January 14, 1994 the District Court filed a Memorandum of Opinion and Order granting Respondents' Motion to Dismiss, and entered final judgment in favor of Respondents (See, Appendix "A" to Petition for Writ of Certiorari). On February 4, 1994 Petitioners appealed the Dismissal to the U.S. Court of Appeals, Sixth Circuit, and on April 6, 1995 the Court of Appeals filed an opinion affirming the decision of the District Court. (See, Appendix "B" to Petition for Writ of Certiorari).

B. Statement of Facts

The facts set forth in this brief are supported by the evidence of record attached to the original Complaint filed by Petitioners in the U.S. District Court, and the proceedings of other courts which are or have been subject to judicial notice in this proceeding.

i. Introduction

This case involves two very discreet claims related to a much larger dispute concerning a real estate transaction between Petitioner Cleveland Industrial Square, Inc. (hereinafter "Petitioner" or "CIS") and the City of Cleveland (hereinafter the "City"). In the early 1980's the City acquired a large tract of land in the southeastern part of the City. A six-acre portion of this land located at 16007 Seville Road was sold to CIS with the intent that CIS would develop its parcel into an industrial park. On November 17, 1988 the City entered into a development contract, purchase money mortgage and security agreement with CIS. An official deed was signed the same date, and was recorded with the Cuyahoga County Recorder on November 29, 1988. The Deed required CIS to build a 92,000 square foot building within two years of the date the deed was recorded. The Deed further provided that if the building was not built in the time specified, the City would have the right to reenter and retake possession of the property, terminate CIS's interest in the property, and revest title in the City.

On March 6, 1990, almost one and one-half years after the deed was recorded, CIS finally submitted an application to the City's Building Department for a shell permit to construct a building. The permit was approved.[1]

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[1] "Shell" permits do not require zoning approval and do not receive zoning review, because no "use" for the building is stated in the application. However, no new building can be occupied without zoning approval, which is expressed in the form of a use permit.

On April 3, 1990 CIS applied for a use permit under the City's Zoning Code. However, the use to which CIS planned to put the building was not a permitted use in that district, and the use permit was denied. Although CIS could have built the shell building and simply not put it to use, and thereby protect its rights in the property, CIS chose not to build the building. On March 11, 1991 the building was still unbuilt, and the City issued a Notice of Default to CIS, as required by terms of the Deed. A second Notice of Default was issued on March 21, 1991. The notices of default gave CIS three months in which to cure the default, as specified in the terms of the Deed. Three months elapsed and the default was not cured. Thereafter, the City re-entered the property and asserted its possessory and title interests therein. On April 30, 1992 an affidavit was filed with the Cuyahoga County Recorder by Kenneth G. Silliman, one of the Respondents, stating the facts relating to the City of Cleveland's exercise of its reversionary interest in the property, pursuant to Ohio Revised Code Section 5301.252(B)(3).

As previously stated, CIS could have simply built an empty building to protect its rights in the property. However, CIS chose to litigate on a number of fronts. This case is one of three lawsuits commenced by CIS regarding its dispute with the City. Although the other two cases involve other parties and concern legal issues which are wholly distinct from the discreet issues framed by the Complaint filed in this case, they must be explained in order to understand the larger dispute. Understanding the larger dispute is important because, despite the very narrow scope of the Complaint below, Petitioners quite

clearly seek to re-litigate the entire dispute in this proceeding, the doctrine of *res judicata* notwithstanding. A brief discussion of these cases follows:

ii. The Zoning Case

After CIS's application for a use permit was denied on April 5, 1990, CIS appealed to the Board of Zoning Appeals. After an extensive hearing, the appeal was denied by the Board of Zoning Appeals on July 16, 1990. CIS filed an administrative appeal of the decision of the Board of Zoning Appeals with the Cuyahoga County Court of Common Pleas, pursuant to section 2506.01 *et seq.* of the Ohio Revised Code. On February 21, 1991 the Court of Common Pleas reversed the Board of Zoning Appeals, and ordered the use permit to be granted.[2] The City appealed the decision of the Court of Common Pleas, and on October 8, 1992 the Ohio Court of Appeals, Eighth District, *reversed* the decision of the Common Pleas

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[2] At pages 2-3 of the Petition it is stated that "the Trial Court ruled that the City's decision denying Petitioner the use permits and electrical permits was arbitrary and unreasonable." This is false. In fact, the Common Pleas Court ruled that the *decision of the Board of Zoning Appeals* was arbitrary and unreasonable. This is important because the Board of Zoning Appeals is not a party to *this* case and, although all of the Respondents were City employees during the relevant time period, none of them were members of the Board of Zoning Appeals, and none of them were the Zoning Administrator, who made a ministerial decision to deny the use permit. This is, in turn, important because even though it was not an issue in the case below, CIS now claims the denial of the use permit is its main ground for relief in *this* case. (Petition, p. 17).

Court, and reinstated the decision of the Board of Zoning Appeals. *See, Cleveland Industrial Square, Inc. v. Cleveland Board of Zoning Appeals* (1992), 83 Ohio App.3d 301. No further appeal was taken from that decision. Therefore, as a matter of law, the use permit for which CIS applied is illegal, and the Zoning Administrator properly denied the application.

Despite the decision of the Court of Appeals vindicating the denial of the use permit, CIS continues to claim in this case that the Zoning Administrator's decision was arbitrary and that his denial of the use permit created a force majeure excusing CIS's default under the Deed. (Petition, pp. 3-4). This claim is, of course, completely untenable.[3]

While the zoning case is completely irrelevant to the discreet issues presented in this case, it does negate Petitioner's underlying claim by establishing that none of the Appellees in this case "prevented" CIS from constructing

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[3] Even if the doctrine of *res judicata* were somehow to be suspended, to prevail on such a claim the Petitioner would have to additionally prove:

1) that the Zoning Administrator had the discretion to decide *not* to apply the zoning laws,
2) that the operation of law (the Zoning Code) could amount to a force majeure in any case,
3) that CIS was unable to use the property for one of the uses permitted in that district, and was instead entitled to establish a new non-conforming use.

Of course, the doctrine of *res judicata* does apply to this claim as a result of the Zoning Case *and* as a result of the Injunction Case, which directly addressed this claim.

a 92,000 sq. ft. building on the property in accordance with the Deed.

iii. The Injunction Case

On April 15, 1991, approximately one month after the City issued notices of default to CIS pursuant to the terms of the Deed, CIS filed a Complaint for Declaratory and Injunctive Relief in the Cuyahoga County Court of Common Pleas (Case No. 208583), seeking to enjoin the City from exercising its reversionary rights under the Deed, and further seeking declaratory relief establishing that CIS was not in default of the Deed and the other conveyance documents. The City counterclaimed for declaratory relief, to establish that CIS was in fact in default of the Deed conditions. CIS also filed a Motion for Preliminary Injunction, which was merged with the Trial on the Merits, and the case was tried on June 25, 1991. As a result of the trial, CIS's request for preliminary and permanent injunctive relief was denied.[4] It is undisputed that CIS attempted and failed to obtain injunctive relief, and there has never been any order of any court preventing the City from exercising its reversionary rights under the Deed.

CIS appealed the decision of the trial court. On March 9, 1995 the Ohio Court of Appeals, Eighth District, filed an opinion and journal entry affirming the decision of the trial court in all respects. *Cleveland Industrial*

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[4] Further, it was the intent of the Trial Court that the denial of CIS's request for injunctive relief would effectively grant the City's counterclaim, establishing CIS's default.

Square, Inc. v. City of Cleveland, March 9, 1995 (unreported), Case 67068 (Ct. App. Cuyahoga). The Court of Appeals found that Petitioner was not entitled to injunctive relief (either preliminary or permanent) upon its theory that the City's denial of its use permit created a force majeure. The Court of Appeals found, as a matter of law, that 1) Petitioner was aware that zoning regulations would have to be complied with when it agreed to purchase the property, 2) Compliance with the applicable zoning ordinances was within Petitioner's control, and 3) the denial of the use permit was not a force majeure.

On August 9, 1995 the Ohio Supreme Court declined Petitioner's motion to assume jurisdiction over the case, thus finally terminating the injunction case. *Cleveland Industrial Square, Inc. v. City of Cleveland* (1995), 73 Ohio St. 3d 1425. While the issues presented in the injunction case are irrelevant to the discreet issues involved in this case, the injunction case does conclusively demonstrate that Petitioner's underlying claim, that the City "prevented" construction of its building and created a force majeure (Petition, p. 3), is groundless. The injunction case also demonstrates that, at least regarding the due process aspect of Petitioner's Slander of Title claim (Count II of the Complaint), CIS has received a trial on the merits and a decision from a tribunal which could have ordered relief (i.e., due process of law), and it received all of this *prior to* the City exercising its right to re-enter and revest title in the subject property.

iv. This Case

In Count I of the Complaint below, entitled "Conversion", CIS claims that on July 8, 1992, the Respondents removed two signs and some structural steel from the disputed property. Respondents obviously deny these allegations, but they are admitted for the purposes of analyzing whether the trial court's dismissal of the Complaint, pursuant to Federal Rule 12(b)(6), was proper.

Count II of the Complaint below was entitled "Slander of Title" and concerned the affidavit filed by one of the Respondents herein with the Cuyahoga County Recorder, reflecting the fact that the City had re-entered and retaken possession and title of the subject property. The affidavit for the most part merely sets forth the state of the injunction case as of the date of the affidavit. CIS's Complaint below does not allege that any of the statements in the affidavit are false. The Complaint merely states that CIS was deprived of its right to due process of law.

Respondents do not dispute that the affidavit was filed, or that Exhibit B to Petitioner's Complaint below is a true copy of said affidavit.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FILED IN THE CASE BELOW UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE, BECAUSE THE COMPLAINT FAILED TO ALLEGE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, INASMUCH AS IT FAILED TO PLEAD THAT STATE REMEDIES FOR REDRESSING THE WRONG ARE INADEQUATE.

A. Simple Compliance With Rule 8(a) Of The Federal Rules of Civil Procedure Does Not Foreclose Dismissal Of A § 1983 Claim Where The Claim Is Not Pleaded With The Specificity Required By *Parratt v. Taylor,* 451 U.S. 527 (1981).

In Petitioner's First Argument, CIS claims that its complaint was improperly dismissed because the Complaint complied with the requirements of Rule 8(a) of the Federal Rules of Civil Procedure. However, it is beyond dispute that Civil Rights cases brought under 42 U.S.C. § 1983 must be pleaded with a level of specificity exceeding that required by Federal Civil Rule 8(a). *Arnold v. Board of Education,* 880 F.2d 305, 309-310 (11th Cir. 1989). Federal Courts have come to the conclusion that without some limitation drawing a distinction between tort law and genuine constitutional claims, virtually any tort involving a public official could rise to the level of an actionable Due Process violation. For these reasons, certain factual and/or legal matters must be specifically set forth in the pleadings to ensure that public officials are not unnecessarily distracted from their duties by the need to defend unmeritorious claims. *Id.*

This Court struggled with one of these matters in the case of *Parratt v. Taylor,* 451 U.S. 527 (1981). In that case this Court admitted that the plaintiff's complaint satisfied the three prerequisites of a valid due process claim, but nevertheless had not stated a claim for relief under 42 U.S.C. § 1983. *Id.* at 537-538. In *Parratt* this Court found that it was necessary to impose an additional requirement of specificity in order to adequately set forth a § 1983 claim; namely, that there are no adequate state law remedies available to redress the wrong alleged. *Id.* syllabus. This Court found that without this requirement:

> any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.'

Id. at 544. (citation omitted).

The failure in this case, by Petitioner, to allege the inadequacy of state law remedies is the pleading defect which renders dismissal appropriate, regardless of whether the Complaint complies with Civil Rule 8.

In *Vicory v. Walton,* 721 F.2d 1062 (6th Cir. 1983) the U.S. Court of Appeals, Sixth Circuit, unambiguously mandated that the *Parratt* requirement should be imposed at the pleading level:

> . . . we hold that in section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the plaintiff must plead and prove that state

> remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong.

Id. at 1066.

In *Vicory*, the plaintiff did not allege any significant deficiency in the state's remedies, and a judgment for the plaintiff was reversed. In order to justify the dismissal of the Complaint below, it is necessary only to demonstrate that the pleading requirements of *Parratt* and *Vicory* apply, and that there is in fact an adequate remedy at state law.

Although the *Parratt* doctrine originally applied to negligent deprivations of property occurring without due process of law, this Court, in *Hudson v. Palmer*, 486 U.S. 517 (1984), extended the doctrine to unauthorized *intentional* deprivations of property by state employees. *Id.* at 533. This Court reasoned that, as in the case of negligent deprivations, the state's action in depriving someone of property without due process of law is not complete (and thus is not actionable) until and unless it provides or refuses to provide a suitable post-deprivation remedy. *Id.* The intentional torts of Conversion and Slander of Title are thus subject to the pleading requirements of *Parratt* and *Vicory* when pleaded as section 1983 claims.

Secondly, while the *Parratt* pleading requirement may not be imposed upon section 1983 plaintiffs whose claims are based upon substantive due process concerns or specific protections defined in the Bill of Rights, the policy concerns set forth in *Parratt* mandate that it must

be imposed where the plaintiff's claim is based upon *procedural due process*, i.e., where the plaintiff is allegedly deprived of property *without a fair procedure*. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). As this Court observed in *Zinermon*:

> the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide due process.

Id. at 125-126. (citations omitted) (emphasis in original).

Therefore, if the claims of CIS are *procedural* due process claims and not substantive due process claims, and if there is an adequate remedy at state law, these claims must fail. As the following discussion demonstrates, this is precisely the case.

The complaint below quite specifically sets forth the Petitioner's civil rights action into two tort claims, going so far as to entitle them "Conversion" and "Slander of Title." Under the Conversion claim it is alleged that the Respondents removed two signs and some structural steel from the disputed property and that such acts violated the plaintiff's right to due process of law. Under the Slander of Title claim it is alleged that one of the Respondents filed an affidavit with the Cuyahoga County Recorder, slandering plaintiff's putative title in the disputed property, and that this act deprived plaintiff of its right to due process of law.

There is no specific constitutional right protecting CIS from the torts of conversion or slander of title by state officers, and CIS does not allege that there is.[5] Rather, like the plaintiff in *Parratt*, CIS's complaint "refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the due process clause of the Fourteenth Amendment *simpliciter.*" *Parratt*, at 556. Further, CIS has not alleged, and there is no reason to believe, that substantive due process considerations are involved in this case. A substantive due process claim actionable without regard to *Parratt* must involve a deprivation of life, liberty or property so shocking to the court's conscience that it is actionable under the Constitution regardless of what procedural safeguards are in place. *Zinermon*, at 125; *G. M. Engineers*, at 332. The deprivations alleged in this case clearly do not fit in that category.[6] Therefore, CIS's claim can only be analyzed as

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[5] Indeed, the extent of due process protection for property rights of the type held by Petitioner was the subject of *G. M. Engineers and Associates v. West Bloomfield Twp.*, 922 F.2d 328 (6th Cir. 1990), a case presenting a situation virtually identical to this appeal. In *G. M. Engineers*, the developer entered into a development contract with a landowner, subject to a deadline by which the developer was to have performed. Failure to obtain local development approvals caused the deadline to be missed and the landowner terminated the contract. The Court found that the developer's contract rights were property for purposes of the Constitution (thus placing it on the same level as the Deed in this case), but that this property right was not specifically protected by the Constitution, other than by the Due Process Clause of the Fourteenth Amendment, *simpliciter*. The Court therefore found *Parratt*, *Hudson* and *Vicory* applicable. *Id.* at 331-332.

[6] Likewise, the U.S. Court of Appeals, in *G. M. Engineers*, found the deprivation of the Plaintiff's property in circumstances

a claim for deprivation of property without *procedural* due process. The pleading requirements of *Parratt* and *Vicory* clearly apply.

Finally, there is no dispute that Ohio law in fact does provide a tort remedy applicable and adequate to redress CIS's claims. In fact, CIS presumably set forth its claims under the headings of "Conversion" and "Slander of Title" precisely to set forth their recognition under state common law. The very fact that they are common law torts demonstrates that a state law remedy is available and the federal action is not. *Bettio v. Village of Northfield*, 775 F.Supp. 1545, 1555 (N.D. Ohio 1991). CIS has not alleged that it could not bring an appropriate action in state court for the recovery of its signs and its structural steel, or to recover damages for the supposed conversion of these items by Respondents. Taking the allegations as true for the purposes of Rule 12(b)(6), CIS presumably could maintain an action in replevin to recover the items, or an action in damages against the appropriate defendants for conversion. CIS has not claimed that these remedies are not available.

Similarly, on the slander of title claim, CIS could bring an action for damages, or an action to quiet title regarding the disputed property, or both. CIS has not alleged it could not bring these claims in state court. In addition, assuming that in either of these cases CIS had advance warning of the commission of these intentional torts, CIS could petition the state court for injunctive

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virtually identical to this case not so shocking as to set forth a claim in substantive due process. *G. M. Engineers*, at 332.

relief to prevent a potential tortfeasor from committing the tort. In fact, it is undisputed that CIS received advance warning of the City's plans to exercise its reversionary interest in the subject property, pursuant to the terms of the deed, and sought an injunction in state court to prevent the same. Although CIS failed to achieve any of the injunctive relief it requested, CIS has not alleged any defect in this remedy.

State officials obviously have no authority to commit intentional torts. In this case CIS has alleged nothing more than two unauthorized intentional torts, both random and unauthorized acts not taken pursuant to an established state procedure. Accordingly, this case falls squarely within *Hudson v. Palmer, supra,* and *G. M. Engineers and Associates v. West Bloomfield Twp.*, 922 F.2d 328 (6th Cir. 1990). The fact that CIS can and did pursue its state law remedies demonstrates that the case should be and was properly dismissed under the doctrines of *Parratt, Hudson* and *Vicory.*

B. Appellant's Complaint Below Was Properly Considered And Dismissed Under Federal Civil Rule 12(b)(6).

Petitioner's Second Argument alleges that its Complaint below was sufficiently pleaded under the Federal Rules of Civil Procedure, but does not mention which rule is specifically at issue. Since the Motion to Dismiss filed by Respondents specifically asked for consideration and dismissal under Rule 12(b)(6), Respondents assume that CIS's argument *contra* relates to Rule 12(b)(6).

Federal Civil Rule 12(b)(6) permits the trial court to consider and enter judgment pursuant to the Defendant's defense of failure to state a claim upon which relief can be granted. *Hoeffling v. United States Steel, Great Lakes Fleet, Inc.*, 792 F.Supp. 1029 (E.D. Mich. 1991). Pursuant to Civil Rule 12(b)(6), a complaint fails to state a claim upon which relief can be granted if "it appears beyond a doubt that the plaintiff can prove no set facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, the allegations as pleaded are taken as true.

In this case, the crucial issue is whether Petitioner's allegations, if true, are actionable under 42 U.S.C. § 1983. As set forth in Respondents' prior argument, the actionability of CIS's claims depends upon a further allegation that state law remedies are inadequate to redress the wrongs which are taken as true for the purposes of the proceeding below.

Admittedly, it probably would have been inadequate for the court below to simply observe the lack of such allegations and dismiss the complaint. Appropriately, the trial court, pursuant to *Conley*, examined what set of facts might be proven consistent with the Complaint in order to determine whether Petitioner's claims were actionable as pleaded. CIS claims that the court below improperly went outside the pleadings to do this. However, a close reading of the District Court's Memorandum of Opinion indicates that the court referred only to evidentiary items which were attached to the Petitioner's Complaint, and to state law and the records of state court proceedings, all of which the court is permitted to do in considering a motion to dismiss. *Rodic v. Thistledown Racing Club, Inc.*,

615 F.2d 736, 738 (6th Cir. 1980), *cert. denied*, 449 U.S. 996 (1980). Indeed, had the District Court not carefully examined CIS's claims as it did, and simply dismissed the case without opinion, CIS would no doubt claim that the trial court had a duty to make such an examination of what facts might be proved by CIS.

CIS's two highly specific claims of intentional tort set forth in its Complaint clearly framed the issues for the trial court, and in response to Respondents' Motion to Dismiss under the doctrines of *Parratt, Hudson* and *Vicory,* the proceeding under Rule 12(b)(6) was reduced to the discreet issue of whether CIS's two tort claims were cognizable under state law. As set forth in the Respondents' first argument, if these claims are cognizable under state law, then due process has or could be afforded under established state procedures, thus vitiating the § 1983 claim.

The District Court found that the Conversion claim was actually made against the City of Cleveland, and that because no municipal policy was alleged, the complaint failed to state a federal claim under *Monell v. New York Dept. of Social Services,* 436 U.S. 658, 690 (1978). On the Slander of Title claim, the trial court found that Petitioner had been afforded due process through the pursuit of its injunction action in state court, and thus failed to state a claim for deprivation of procedural due process of law.

A section 1983 case may be dismissed on a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *G. M. Engineers, supra.* A reviewing court considering dismissal of a complaint under Rule 12(b)(6) is not limited to affirming or reversing on the rationale of

the district court, but may review the case *de novo. Dugan v. Brooks,* 818 F.2d 513, 516 (6th Cir. 1987). The U.S. Court of Appeals analyzed the case under *Parratt, Hudson* and *Vicory,* as against the individual Respondents, and affirmed the dismissal of the Complaint based on the failure to allege the inadequacy of state law remedies. The Court of Appeals did not analyze the case as a *Monell* claim, as did the District Court, but noted that dismissal was appropriate under the *Monell* analysis as well.

The discreet issue in this case is whether Petitioner, in its Complaint below, failed to allege the lack of a meaningful post-deprivation remedy, under state law, for the wrongs complained of in its Complaint. This much has been admitted by Petitioner. Therefore, an essential element of Petitioner's section 1983 claim is missing, and dismissal of the claim is appropriate. Accordingly, the dismissal of Petitioner's Complaint was properly affirmed by the Court of Appeals.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

U.S. Constitution, Fourteenth Amendment,
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings

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(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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